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No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION AND REGAL TUBE COMPANY,

Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

VICTOR E. GRIMM
(Counsel of Record)
JOHN R. MYERS
SCOTT M. MENDEL
ANDREW I. GAVIL
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602
(312) 372-1121
Attorneys for Respondent

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Merrill/Gunthorp Warren, Chicago • 372-2800

QUESTIONS PRESENTED

In this antitrust action, a unanimous Court of Appeals found "unassailable" the conclusion that Petitioners, parent and subsidiary corporations, engaged in a conspiracy to exclude a competitor by inducing suppliers to refuse to deal with Respondent. Those activities succeeded in excluding Respondent from the structural steel tubing market for a substantial period, thereby precluding price competition and restricting product supply. The questions presented are:

1. Whether this Court should overrule its decisions of the last thirty-five years and judicially create an exemption under Section 1 of the Sherman Act for otherwise unlawful combinations or conspiracies when perpetrated by separate but affiliated corporations.

2. Whether exclusion of a competitor thereby eliminating price competition and reducing product supply constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

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F. EASTERBROOK and R. POSNER, ANTITRUST LAW (2d ed. 1981) 15

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BRIEF IN OPPOSITION

STATUTES

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Section 8 of the Sherman Act, 15 U.S.C. §7, provides in pertinent part:

> The word "person," or "persons," wherever used in Sections 1 to 7 of this title shall be deemed to include corporations....

STATEMENT OF THE CASE

A. Introduction

Petitioners would have the Court believe that this case involves nothing more than a tort claim masquerading as an antitrust action. (Petition at 2, 22) To the contrary, this case is a classic example of the kind of concerted predatory activities and adverse competitive effects that the antitrust laws were intended to proscribe. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334, slip op. at 9 (U.S. February 22, 1983); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Driven by fears of price competition, Petitioners conspired from 1973 to 1975 to exclude Respondent from the structural steel tubing market. To achieve that end, Petitioners, through threats and intimidation, sought to establish a group boycott of Respondent by its suppliers. As a direct result of the conspiracy, Respondent was excluded from the market for as long as one year, thereby reducing product supply and inflating prices for as long as two years.

This Court has consistently recognized that in such anticompetitive circumstances "private suits are an important element of the Nation's antitrust enforcement effort...." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S.Ct. 1935, 1945 n.10 (1982). Nevertheless, Petitioners now implore the Court to create a new antitrust exemption that would permit them to escape the consequences of their anticompetitive actions.

B. Background of the Case

The factual summary contained in the Petition is misleading in its incompleteness and characterizations, and contains inferences obviously rejected by the jury, the District Court and the Court of Appeals. Therefore, a more complete and accurate statement is required.

Regal Tube Company ("Regal"), a manufacturer of structural steel tubing, was acquired by Copperweld Corporation ("Copperweld") from Lear Siegler, Inc. ("LSI") in 1972 as an "ongoing business." (Stip. 15; T. 3031) Regal was separately incorporated and was maintained as an independent profit center because Copperweld's president, Phillip Smith, wanted Regal to "stand on its own two feet." (PX 995; T. 445-46, 4976-81, 6943-44) Bedford Foster, president of the new corporation, assumed the "sole responsibility and authority over the entire operations" of the firm and testified that "in all material respects" the operations of Regal were controlled in Chicago, not in Pittsburgh where Copperweld was located. (PX 579; T. 1762-65)

Foster replaced David Grohne, who continued as an employee of LSI until later in 1972 when he became involved in establishing Independence Tube Corporation ("Independence") as a new structural tubing producer.[1] (Stip. 21, 31-32; T. 207-12) When Foster learned that Independence was being formed, he reported the fact to Smith. They were aware of Grohne's reputation as a "price cutter," and Smith observed that the new enterprise "could create a problem for Regal." (PX 393; T. 1308, 1772-75) At that time, there were only a "few competing companies" which were able to produce the size range of tubing which Independence intended to produce, and Regal's market strategy was to "emphasize pricing stability." (PX 30, 34)

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[1]Independence has no parent or subsidiary corporations.

At Smith's request, Copperweld's attorney considered whether a noncompete agreement between LSI and Copperweld could be used to "stop Grohne." (PX 1055) In response to this inquiry, Smith and Foster were advised that "the noncompete cannot be used against Grohne. . . ." (PX 394) Nevertheless, Petitioners proceeded to contact every conceivable potential supplier of Independence to discourage them from dealing with Independence.

On February 19, 1973, Copperweld learned from a private investigator, who had been retained to conduct surveillance of the new enterprise, that The Yoder Company ("Yoder") had agreed to supply a $1,000,000 tube mill to Independence. Using information supplied by Foster, Smith immediately sent a threatening letter to Yoder, as well as to other mill manufacturers, and to Chicago's two largest banks, among others, who were suspected of being financing and supply sources for Independence. Two days later, Copperweld sent similar letters to industrial real estate firms identified by Foster to be negotiating with Independence for a factory site. (PX 66, 132, 141, 168, 214, 236, 408, 431, 443, 446, 718)

In total disregard of the legal advice Smith and Foster had received, the letters implied that Grohne was covered by a noncompete agreement. These letters threatened "any and all steps" to pursue Petitioners' "rights" under the agreement and to protect Regal's alleged "trade secrets." (PX 66) As Foster well knew, and as William Jentes of the Kirkland & Ellis law firm later advised, Regal's operation "cannot be classified as involving trade secrets." (PX 1194; T. 6049-51)

Yoder recognized that the intent of Smith's letter was "scaring off potential suppliers and customers" of Independence, but did not want to offend its "good customer and prospect, Copperweld." Therefore, Yoder immediately cancelled its agreement

to supply a tube mill to Independence.[2] (PX 77, 78; T. 2659-61) Independence requested that Copperweld retract its letter so that Yoder might proceed, but Copperweld refused. Smith insisted that they "keep the pressure on," and remained convinced that "there is plenty we can do to block Grohne." (PX 430, 433, 1060; T. 6064-67) What followed was a second and third wave of letters to mill manufacturers, a second set of letters to real estate firms, and persistent personal contacts by Copperweld and Regal with suppliers, and later with customers, discouraging them from dealing with Independence. (PX 90, 92, 223, 237-38, 448-49, 451-53, 740, 1100, 1105; T. 498-502, 508-10, 1333-37, 1561-69, 2242-52, 2256, 2392-93, 2395-96, 2448-50, 2453, 2461-63, 2470-71, 2662-63, 2666-68, 2670, 2683-84, 4047-50)

One of the remaining mill manufacturers, Abbey Etna Machine Company ("Abbey Etna"), assured Foster that it "would certainly not be doing business" with Independence after it received the first of three letters from Copperweld. When Foster learned that Abbey Etna later agreed to supply a mill to Independence, he notified Smith and pointed out that the mill would cover "a most important part of our size range." Smith in turn told Abbey Etna's president that it would be "illegal" to supply the mill and threatened to sue both Abbey Etna and Grohne. (PX 448, 740) Copperweld's counsel had advised Smith that same day, however, that any such action would be unsuccessful and would trigger a substantial antitrust counterclaim. Smith had been previously warned of the danger of such an antitrust suit by Independence based on a claim that Petitioners had "harassed potential financial and equipment suppliers from doing business

[2] Yoder later protested that, despite its compliance with Petitioners' desires not to deal with Independence, Petitioners had not reciprocated by considering it as a supplier for two large mills. Yoder was assured that it would receive consideration on future projects. (PX 98, 411; T. 1428-29, 1432-34)

with him, thus restricting competition." (PX 449, 481) Nevertheless, Copperweld's counsel, who was also a member of its board of directors, had recommended that Grohne be "kept under continued surveillance and once he starts to operate or solicit business we should pounce on him." (PX 478)

Copperweld and Regal enforced their threats by retaliating against those firms which continued to deal with Independence. Regal "shut off" a steel supplier; and Copperweld and Regal withdrew their accounts from the bank which had financed Independence even though the bank had refused to extend the term or increase the amount of its loan commitment to Independence as a result of pressure from Petitioners. (T. 314, 2314-15, 2464-65, 2662-64, 2871-74, 3756-57)

Petitioners' boycott efforts excluded Independence from the structural tubing market for at least nine months and more probably a full year, thereby substantially affecting price and product supply.[3] Moreover, the Abbey Etna mill was incapable of producing the larger sizes of tubing that the Yoder mill could have produced. As a result, Independence has been completely excluded from a portion of the market where a very few firms have preserved high prices and profit margins. (PX 34, 52, 53, 770; T. 317-21, 2479-84, 6855, 8891-92, 9918-23)

Petitioners had recognized that Independence would be a "price cutter" and would likely have a substantial effect on a market where price is the "primary determining factor to the customer." (PX 30; T. 1308) Regal began to moderate its prices

[3]Independence entered the market at the height of a severe shortage of raw steel and, because of the delay, had been unable to obtain advance commitments for steel, resulting in further reductions in structural tubing supply during the remainder of the shortage period. (T. 321-23, 328, 2399-2402, 2478, 2882, 6890-96)

in March 1974, six months before Independence began production, so as not to "make it easy for Independence Tube to enter the market." (PX 43) But for Petitioners' exclusionary efforts, that price moderation would have begun a year earlier.

Independence ultimately succeeded in bringing significant new price competition in tubing sizes where there had been high market concentration and little price competition. Regal attempted to preserve that price stability and to act as a price leader even after Independence entered the market. Nevertheless, throughout 1975 and 1976 Independence led a substantial price decline, forcing Regal and others to continually reduce their prices. When Regal's largest customer insisted that Regal meet Independence's prices or lose business, Regal complained that its cost structure did not permit further price reductions. Shortly thereafter, Petitioners made unsuccessful overtures to acquire Independence. (PX 34, 106, 334, 473, 620; T. 352-54, 2313, 2477-84, 2691-2906, 3911-21, 4729-30, 6778-79)

REASONS FOR DENYING WRIT

In order to avoid liability for their anticompetitive activities, Petitioners ask this Court to ignore the clear statutory mandate of the Sherman Act, to overturn thirty-five years of uninterrupted Supreme Court decisions and to create a new antitrust exemption for restraints of trade perpetrated by a parent and its wholly-owned subsidiary. Petitioners' plea for such a revolutionary revision of antitrust law and policy is more properly addressed to Congress than to the Court.

The legislative history and the statutory language of the Sherman Act clearly establish that Congress intended to prohibit unreasonable trade restraints, regardless of whether they were imposed by affiliated corporations or by unrelated firms. Consistent with this statutory mandate, the Court, since at least *United States* v. *Yellow Cab Co.* , 332 U.S. 218 (1947), has repeatedly

refused to create a judicial exemption for affiliated corporations and has held that the proper approach in such cases is to focus on the competitive impact of the practices in issue. Where such practices impose anticompetitive restraints upon third parties, as distinguished from restraints solely concerning internal corporate affairs, the Court has held that the Sherman Act may be violated. *See, e.g.*, REP. OF THE ATT'Y GEN'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 34 (1955) ("ATTORNEY GENERAL'S REPORT").

Petitioners do not contend that there is any conflict among the circuits as to whether affiliated corporations are legally capable of conspiring. They argue instead that there is "disarray" among the lower court opinions. The alleged differences in these opinions, however, are a reflection of differing fact situations; they do not represent conflicting legal principles. The courts of appeals have given attention to the competitive effects of the practices in issue, and, in so doing, they have considered the antitrust significance of the corporate relationships among alleged conspirators.

Petitioners ask the Court to "fashion a new rule" of *per se* lawfulness for parent-subsidiary activities regardless of how pernicious their anticompetitive purpose or effects. Such a rule would collide with national antitrust policy and would represent an impermissible, judicially created exemption from the antitrust laws. *United States* v. *Topco Associates*, 405 U.S. 596, 611 (1972).

Petitioners also argue that there was insufficient evidence of adverse competitive effect in this case, despite the increase in price and decline in product supply that resulted from their acts. In order to escape the impact of that evidence, Petitioners ask the Court to judicially create a second new antitrust rule which would excuse anticompetitive conduct unless defendants are also shown to have some undefined level of "market power." There is no logical or legal basis for such a rule.

I. There is no Basis for Reconsideration of This Court's Decisions Holding That Conspiracies Between Affiliated Corporations are not Exempt From The Sherman Act.

A. This Court's Decisions are in Complete Accord with Congressional Intent and are not a Source of Confusion.

In seeking reversal of the long line of Supreme Court cases dealing with conspiracies between affiliated corporations, Petitioners contend that those decisions are a source of "uncertainty" and "confusion." (Petition at 17-19) Yet, this Court's decisions are a manifestation of congressional intent and provide a practical basis for effectuating national antitrust policy.

By its adoption of the Sherman Act, Congress established a national antitrust policy against unreasonable restraints on free competition. Congress was primarily concerned with the substantive effects of trade restraints and not with the form by which any particular restraint might be imposed. Thus, the Sherman Act was intended to apply to every form of "coordination from the loosest general understanding to the tightest-knit integration." Bork, *The Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 22 (1966). In accordance with this objective, the common law principle that corporations are distinct legal "persons" and are therefore capable of conspiring together became a basic Sherman Act tenet. 15 U.S.C. §§1, 7; L. SULLIVAN, LAW OF ANTITRUST 327 (1977). Indeed, one of the primary targets of the Sherman Act was the commercial "trust" which consisted of separate but commonly owned or controlled economic entities. *See, e.g., Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911).[4]

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[4]Section 1 specifically prohibits every "combination in the form of trust or *otherwise*" which restrains trade. During the congressional debates, Senator Teller, specifically referring to the members of the Standard Oil trust, stated: "Each corporation is a creature by itself." 21 CONG. REC. 2571 (1890), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 182 (1978). Similarly, Senator Sherman considered "combination" as used in the Act to include combinations of affiliated corporations. The crucial factor to be considered was the combination's effect on competition. 21 CONG. REC. 2457-60 (1890), *reprinted in* E. KINTNER, *supra*, at 117-21.

Conspiracy cases involving parent-subsidiary relationships were among the first Sherman Act cases to reach this Court. In *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), the defendant and five of its "accessory corporations" were charged with a Sherman Act conspiracy. In holding that American Tobacco and its subsidiary corporations violated Section 1, the Court stated: "[T]he combination as a whole, involving all of its cooperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section ...." *Id.* at 184. *See also United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 376-77 (1933).

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court was asked for the first time to judicially create an exemption for parent-subsidiary combinations. In refusing to do so, the Court relied upon the clearly manifested legislative intent:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate inter-relationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377.

> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.

332 U.S. at 227.

The Court applied the principles of *Yellow Cab* in *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948) and in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). In both cases, the Court was presented with the same argument which Petitioners repeat here, that common ownership should free corporations from Sherman Act Section 1 coverage, and in both cases, the Court declined to read any such exception into the statute. Thus, in *Kiefer-Stewart*, a unanimous Court stated:

> Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws.

340 U.S. at 215. *See also Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951).

The Court again squarely addressed the issue in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). There, the court of appeals had affirmed dismissal of the complaint before trial on the ground, among others, that the affiliated corporate defendants were incapable of combining or conspiring

under the Sherman Act. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 376 F.2d 692, 699 (7th Cir. 1967). The Court reversed and unequivocally stated:

> [S]ince respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.

392 U.S. at 141-42.[5]

The Petition incorrectly suggests that some "recent" pronouncements of this Court represent a departure from these consistent holdings. (Petition at 18-19) To the contrary, the cases cited by Petitioners reaffirm those principles. For example, in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), the Antitrust Division challenged certain practices of affiliated corporations. In ruling on those practices, the Court engaged in an analysis which considered: (1) the nature and extent of the relationship between the affiliated corporations, and (2) the competitive effects of the challenged practices to determine whether under the particular facts of the case there was an unreasonable trade restraint. In the course of its discussion, the Court again reaffirmed the holding of *Yellow Cab* that "the corporate interrelationships of conspirators . . . are not determinative of the applicability of the Sherman Act." *Id.* at 118.

The *Citizens & Southern* case clearly demonstrates the Court's consistent concern with the competitive impact of the restraint in issue rather than the form by which the restraint is

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[5]Petitioners argue that the Court's rulings in *Yellow Cab* and its progeny were unnecessary to the Court's ultimate disposition of the cases because "alternative" grounds might have been found to support the result. (Petition at 16-18) However, in each decision the Court expressly held that a parent and subsidiary are capable of combining or conspiring in violation of Section 1.

imposed.[6] Thus, the legal analysis in parent-subsidiary cases is simply a rule of reason approach extended to give consideration to the circumstances of the corporate relationships as well as to the competitive effects of the restraint. Where affiliated corporations are doing nothing more than dealing with internal management affairs, their activities may have no antitrust significance. However, activities of distinct, but affiliated, firms designed to restrict the trade of third parties are an impairment of free competition; that *is* of antitrust concern.

The correctness of these holdings has long been recognized by the Justice Department and by antitrust commentators. The Report of the United States Attorney General's Committee to Study the Antitrust Laws stated:

> The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. . . . Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated.

ATTORNEY GENERAL'S REPORT, *supra*, at 34. The Antitrust Division of the Justice Department adopted the analysis of the

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[6]Similarly, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court gave effect to the statutory agricultural exemption by examining the economic realities of the relationship between the affiliated corporations, much as the Court of Appeals did in the instant case. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 318-20 (7th Cir. 1982); App. A-12-17. *See also United States Steel Corp* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 622-23 (1977) (Burger, C.J., concurring) (alleged combination between parent and subsidiary to engage in a tying practice in violation of Section 1 of the Sherman Act).

Attorney General's Report.[7] In 1977, the Division reiterated its position that the Act reaches "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 12 n.26 (1977) ("GUIDE").[8]

Antitrust commentators have also supported this Court's approach. For example, Professor Sullivan's antitrust treatise states:

> Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade.

L. SULLIVAN, *supra*, at 328. The American Bar Association study of the antitrust laws similarly concludes:

> These, and subsequent Supreme Court decisions, seem to indicate that the intra-enterprise conspiracy doctrine will be applied to strike down concerted action between a parent and subsidiary . . . when the challenged conduct has the purpose or effect of unreasonably restraining the trade of unrelated competitors, customers or suppliers.

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[7]The Department has described this Court's decisions as applying "to situations in which commonly controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities." Letter from Richard McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶50,122, 55,197 (Feb. 22, 1971).

[8]Petitioners disingenuously suggest that the ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS takes a contrary view when they quote from the same page, but fail to refer to the passage most directly in point. (Petition at 20-21)

AMERICAN BAR ASSOCIATION MONOGRAPH, ANTITRUST LAW DEVELOPMENTS 33 (1975). *See also* F. EASTERBROOK and R. POSNER, ANTITRUST LAW 730 (2d ed. 1981).

Thus, contrary to Petitioners' assertions, the holdings of this Court are neither confused, nor uncertain. They are understood and recognized as correct applications of the Sherman Act, consistent with congressionally mandated national antitrust policy. There is no basis for reconsideration of these cases.

B. There is no Conflict Among the Circuits.

Petitioners do not contend that there is any conflict among the circuits on the fundamental question presented, that is, whether a parent and subsidiary are legally capable of conspiring. Indeed, the result in this case would have been the same in every circuit. Nevertheless, Petitioners request that the Court create a new rule which is contrary to the decisions of this Court and to those of all the circuits. (Petition at 9)

Petitioners' attempt to portray "disarray" among the circuits is based on a selective and artificial classification of cases which reflects nothing more than the differing fact settings in which the cases have arisen. Those cases do not represent any conflict in legal principles and simply confirm that a rule of reason-type analysis is often fact intensive. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). In compliance with the standards established in this Court's decisions, the courts of appeals give consideration to the nature of the relationship between parent and subsidiary and to the competitive impact of the practices in issue. As applied by this Court in *Citizens & Southern, supra*, that analysis essentially consists of two inquiries: (1) whether it is reasonable to treat the affiliated firms as distinct economic units,[9] and (2) whether each corporation

[9]As Professor Sullivan states, this analysis turns upon a "variety of factors relevant to the statutory purposes." L. SULLIVAN, *supra*, at 326. These factors include matters such as the extent of ownership integration; separateness of management; separateness of physical operations, records and customers; history of the firms; the loss of efficiency if they were required to act as two firms, and the extent to which they can together wield market power not possessed by the firms individually. *Id.* at 328. *See also Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982); App. A-13.

engaged in activities to unreasonably restrain the trade of third parties.

In the present case, the Seventh Circuit conducted such an analysis and examined both the nature of the relationship between Copperweld and Regal and the effect of their conduct. The court found that there was ample evidence to conclude that these firms were operated as separate economic units and not as a single enterprise. The court also determined that both parent and subsidiary undertook acts pursuant to a conspiracy to exclude Independence from the structural tubing market.[10] *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 317 n.5, 320-21 (7th Cir. 1982); App. A-10, 17-19. The court concluded that under these circumstances Copperweld and Regal were capable of engaging in a combination or conspiracy under Section 1. *See also William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir.), *cert. denied*, 103 S.Ct. 57 (1982).

A review of the cases cited by Petitioners, which are gnerally the older cases, does not support their assertion of "disarray" among the circuits. Petitioners rely almost exclusively on cases in which the courts found the absence of a capacity to conspire. In the circumstances of those cases, the courts have often found it unnecessary to reach both the issue of corporate separateness and

[10]The record demonstrated that Petitioners acted in concert to use their combined economic power to exclude Independence by contacting those suppliers with which each had business relationships. Each used the leverage of its relationships to put pressure on firms not to deal with Independence. 691 F.2d at 320; App. A-16-17. Regal had business relationships with mill manufacturers, real estate firms and steel suppliers contacted by Petitioners. On the other hand, Copperweld had separate relationships with steel suppliers and banks pressured by Petitioners. Thus, through concerted action, Copperweld and Regal were able to exert combined power which neither possessed individually. (PX 249, 431, 1100; T. 473-85, 496, 599-600, 1119-21, 1333-36, 1792-99, 2140-42, 2244-47, 2683-85, 4047-51)

the issue of restraint on third parties because one or the other of those issues was dispositive.[11] Thus, contrary to Petitioners' argument, no conflict in legal principle is established by the cases.

Petitioners refer to cases which hold that an important consideration is whether an alleged restraint is directed against third parties. (Petition at 13) As discussed above, the imposition of an unreasonable restraint on third parties is a significant factor in parent-subsidiary cases, but it is not the sole factor. The cases cited by Petitioners do not hold otherwise.[12] Indeed, the significance of both the separateness of the corporations and the competitive impact of their activities is clearly demonstrated by the latest court of appeals decision dealing with the parent-subsidiary conspiracy issue. In *General Business Systems* v. *North American Philips Corp.*, 1982-83 Trade Cas. (CCH) ¶65,177 (9th Cir.

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[11]For example, where a parent and subsidiary are both completely controlled by a single individual and are therefore incapable of conspiring, it is unnecessary to consider the nature and effect of the challenged practices. *See, e.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd on other grounds*, 189 F.2d 797 (4th Cir. 1951). Similarly, where communications between a parent and subsidiary concern only internal management affairs, an analysis of the separateness of the corporations is unnecessary. *See, e.g., Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1267 (9th Cir.), *cert. denied*, 103 S.Ct. 348 (1982).

[12]Petitioners complain that it is difficult to distinguish between "internal" and "external" matters. (Petition at 12) However, they confuse an external restraint of trade with an external effect. The cases do not turn upon external effects incident to internal decisions, but upon the existence of restraints imposed on third parties. ATTORNEY GENERAL'S REPORT, *supra*, at 34-35. The cases cited by Petitioners illustrate the proper application of the concept. *Contrast Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Ca. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 450 U.S. 1018 (1982) (agreement between competing sister corporations intended to exclude competitors could be actionable) *with Universal Lite Distributors, Inc.* v. *Northwest Industries, Inc.*, 452 F. Supp. 1206 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979) ("internal dialogue" was involved as distinguished from activities by both firms directed against third parties).

1983), the district court dismissed the parent-subsidiary conspiracy claim before trial. On review, the Ninth Circuit found that conflicting evidence precluded summary judgment on the issue whether the affiliated companies were operated independently. Nonetheless, the court affirmed the dismissal of plaintiff's parent-subsidiary conspiracy charge because there was no evidence of "specific intent or conduct to eliminate" plaintiff from the market. *Id.* at 71,687.

Petitioners also cite to certain cases which have considered whether the affiliated corporations held themselves out as competitors. Contrary to Petitioners' suggestion, these cases do not stand for the proposition that such "holding out" is the sole basis for determining whether firms are capable of conspiracy. (Petition at 12) These cases merely reiterate the statement in *Kiefer-Stewart, supra*, 340 U.S. at 215, that the existence of competition between a parent and subsidiary is one factor to be considered in determining whether it would be appropriate to find a conspiracy in a given case.[13]

Petitioners refer to cases in which the parent and subsidiary were owned and controlled by a single individual. (Petition at 12) In the circumstances of those cases, the existence of such control was determinative in concluding that the two corporations were in substance a single enterprise, incapable of conspiring. In their effort to manufacture a conflict, Petitioners conveniently ignore the recent decisions from the Ninth Circuit which clearly show

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[13]Petitioners completely mischaracterize *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976), where the court expressly reserved ruling on the parent-subsidiary issue. (Petition at 12) Moreover, Petitioners ignore the most recent cases which totally contradict their description of the Second Circuit's opinions. *See, e.g., Reisner* v. *General Motors Corp.*, 671 F.2d 91, 100 (2d Cir.), *cert. denied*, 103 S.Ct. 130 (1982); *Brager & Company, Inc.* v. *Leumi Securities Corp.*, 429 F. Supp. 1341, 1345-46 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert denied*, 451 U.S. 587 (1981).

their characterizations to be incorrect. *See, e.g., Thomsen* v. *Western Electric Co., supra*; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., supra. See also General Business Systems* v. *North American Philips Corp., supra.*[14]

Finally, Petitioners contend that some courts hold that a parent and subsidiary are automatically capable of conspiracy "without further inquiry." (Petition at 13) Yet, the cases upon which they rely do not support their characterization. The cases hold only that the existence of a parent-subsidiary relationship does not alone immunize the parties from Sherman Act coverage.[15] Again, the most recent cases from the circuits to which Petitioners refer demonstrate a concern with the substance of the relationship between parent and subsidiary and the competitive effects of their activities. *See, e.g., White* v. *Hearst Corp.*, 669 F.2d 14, 15-16 (lst Cir. 1982); *United States* v. *Cotton Baking Co.*, 513 F. Supp. 223, 225-27 (M.D. La. 1981).

Thus, Petitioners' effort to contrive "disarray" among the circuits is not supported by analysis of the cases. The cases upon which Petitioners rely are consistent with the Seventh Circuit's decision in this case and with the decisions of this Court. There is no conflict among the circuits, nor is there any other basis for further review by this Court.

C. Petitioners' Request for an Antitrust Exemption Can Only be Granted by Congress.

Petitioners request the Court to "fashion a new rule" which

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[14]Contrary to Petitioners' assertions, the Fourth Circuit and Sixth Circuit have not directly addressed the parent-subsidiary issue.

[15]In fact, in *Columbia Metal Culvert Co.*, v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), the court cites with approval Professor Sullivan's analysis which distinguishes between "internal management" matters and concerted action by two legal persons which "erects barriers to entry by another firm." *Id.* at 34 n.49, *citing* L. SULLIVAN, *supra*, at 328.

would hold that subsidiary and parent corporations are not separate legal persons capable of combination or conspiracy, regardless of the anticompetitive effects of their activities.[16](Petition at 9) The creation of such an antitrust exemption would conflict with the language and legislative history of the Sherman Act and be contrary to the consistent holdings of this Court. Such radical changes in antitrust policy and law can only be made by Congress.

As discussed in Part I.A., *supra*, Congress clearly contemplated that affiliated corporations would be within the coverage of Section 1 of the Sherman Act. Since at least 1911, this Court has given effect to that congressional intent and has repeatedly rejected requests for an exemption of parent-subsidiary conspiracies. Congress has amended the Sherman Act on a number of occasions, but it has never made any effort to repeal the Act's coverage of such conspiracies.[17] Most recently, Congress amended the Sherman Act to exempt certain foreign trade activities from its coverage. Foreign Trade Antitrust Improvements

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[16] Petitioners argue that antitrust liability should not turn on so formal a distinction as separate incorporation. As outlined above, however, such liability ultimately turns upon substantive factors, and not upon separate incorporation. Moreover, as Professor Sullivan has stated: "It is perfectly defensible when Congress has sought to cast a wide net to catch restraints of trade to conclude that any two legal persons can conspire." L. SULLIVAN, *supra*, at 327.

[17] Congress has not hesitated to amend the antitrust laws when a decision of the Court is perceived as leading to an inappropriate result. *See, e.g., Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (foreign governments entitled to treble damages) and the Foreign Government Damage Recoveries Act of 1982, P.L. 97-393, §2, 96 Stat. 1964 (1982) (amending Section 4 of the Clayton Act to limit foreign governments to single damages); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) and the Antitrust Procedural Improvements Act of 1980, P.L. 96-349, §6(a), 94 Stat. 1154 (1980).

Act of 1982, 97-290, § 402, 96 Stat. 1233, 1246-47 (1982). During the hearings on the Act, Congress extensively discussed the Justice Department's ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, which, as noted above, specifically states that Section 1 reaches "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." GUIDE, *supra*, at 12 n.26. *See generally Foreign Trade Antitrust Improvements Act of 1982: Hearings on S. 795 Before the Committee on the Judiciary, United States Senate*, 97th Cong., 1st Sess. (1981). Thus, although clearly cognizant that the Sherman Act reaches certain parent-subsidiary conspiracies, Congress chose not to immunize such activities. Indeed, in their discussion of the foreign trade amendments, the sponsors emphasized that Congress did not intend to restrict domestic antitrust enforcement in any way.[18]

In seeking immunity for parent-subsidiary conspiracies, Petitioners request this Court to engage in the legislative process. Thus, Petitioners would have the Court weigh the injury to competition which would flow from creation of the requested exemption against the alleged benefits to corporate planning and efficiency which Petitioners contend would result if affiliated corporations were freed from antitrust liability. Such a weighing process would require a re-examination of the basic public policies underlying the antitrust laws, an evaluation of competing societal interests and a revision of the Sherman Act coverage mandated by Congress. The Court has repeatedly refused to invade that legislative province. *See, e.g., Texas Industries, Inc.* v.

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[18] This Court has consistently recognized that Congress is the only proper forum to consider changes in longstanding and consistently applied statutory interpretations. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); *Snyder* v. *Harris*, 394 U.S. 332, 338-40 (1969); *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 184 (1966).

Radcliff Materials, Inc., 451 U.S. 630 (1981). As the Court stated in *United States* v. *Topco Associates*, 405 U.S. 596, 611-12 (1972):

> To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.[19]

Moreover, the "benefits" which Petitioners contend would flow from the requested exclusion of affiliated corporations from antitrust coverage are dubious at best. For example, Petitioners argue that potential antitrust liability might discourage subsidiary formation. Yet, during the 90 year existence of the Sherman Act there is no evidence of such discouragement.[20] (Petition at 15-16) In fact, the "benefits of separate incorporation" identified by the Petitioners are largely statutory creations; they are not economic efficiencies which improve competition or benefit the public. Indeed, Petitioners contend that the separate incorporation of

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[19]The Court has reversed its prior Sherman Act holdings in areas involving the standard of proof to be applied, such as, whether a practice should be tested under the *per se* approach or under the rule of reason. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra.* However, the Court has never considered itself free to completely exclude some segments of commerce from Sherman Act coverage. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

[20]M. EISENBERG, THE STRUCTURE OF THE CORPORATION 277-82 (1976). The economic literature indicates that efficiencies are generally derived from the manner in which a division or subsidiary is structured rather than from the fact of separate incorporation. *See, e.g.,* O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 151-54 (1975); R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 38-40 (1974).

Regal was for the purpose of evading taxes, which hardly enhances efficiency or otherwise creates any public benefit.[21] (Petition at 3)

Petitioners suggest that the Court need not be concerned with permitting anticompetitive activities by parents and subsidiaries under Section 1 of the Sherman Act because Section 2 of the Sherman Act and state tort laws provide sufficient coverage. However, as the Attorney General's Report stated, Section 2 of the Sherman Act does not provide sufficient protection from anticompetitive acts of affiliated corporations: "[W]hen a parent and its subsidiary, *though short of an attempt to monopolize*, nonetheless plan to drive out a competitor, Section 1 may be transgressed." ATTORNEY GENERAL'S REPORT, *supra*, at 34 (emphasis added). Similarly, it is doubtful that state tort laws would reach all of the anticompetitive conduct covered by Section 1 of the Sherman Act. Even if they did reach all such activities, however, that would not justify a refusal to enforce the Sherman Act in the way that Congress intended. As this Court recently stated, the antitrust laws are "at least as broad as a plaintiff's right to sue for analogous torts." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S. Ct. 1935, 1944 (1982).[22]

Petitioners' requested exemption, which would hold that a subsidiary is not a legal person under the Sherman Act, would have serious ramifications in many other areas of the law. This

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[21]Petitioners plead that corporate planning is difficult because of potential antitrust liability. However, the parent-subsidiary conspiracy doctrine has evolved to prohibit exclusionary activities directed at third parties. Thus, corporate planners need only be concerned if they intend to engage in such exclusionary activities.

[22]The fact that Petitioners also tortiously interfered with a contract between Respondent and one of its suppliers pursuant to their conspiracy does not dilute the antitrust significance of their acts. That a contract existed which they were able to interdict was purely fortuitous.

Court has consistently held that under the Sherman Act, as well as other federal statutes, corporate entities "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946).[23] Copperweld and Regal have demonstrably enjoyed the legal benefits of separate incorporation when it has been to their advantage to do so.[24] Now, when Petitioners find it an expedient litigation strategem, they ask this Court to disregard their separate legal status. The Court has dealt with such arguments before and has consistently recognized that affiliated corporations seeking the benefits which the law accords separate incorporation may not elect to disregard that legal status simply because it is advantageous to do so. *Perma Life Mufflers, supra*, 392 U.S. at 141-42.

To disregard separate corporate existence for purposes of antitrust statutes would likely involve the Court in a stream of

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[23]Separate corporate existence is significant in many areas of the law, including corporate liability, personal jurisdiction and venue, taxation, criminal and civil conspiracies and numerous regulatory matters. In these other areas, as in the antitrust area, parents and subsidiaries are treated as separate legal persons except where the parent so dominates the operation of the subsidiary as to require their consideration as a single person. *See, e.g., C M Corp.* v. *Oberer Development Co.*, 631 F.2d 536, 538-39 (7th Cir. 1980). In no instance has the inquiry turned solely on the degree of stock ownership as urged here by Petitioners.

[24]Copperweld and Regal relied on their separate legal existence to avoid liability in *Ayers* v. *Copperweld Corp.*, 487 F. Supp. 593 (S.D. Tx. 1980), where the court granted Copperweld's motion to dismiss stating that the plaintiff had failed to establish "such degree of control" of Regal by Copperweld to justify disregarding their legal separateness. *Id.* at 594. In fact, when it was to Copperweld's advantage, it invoked the parent-subsidiary conspiracy theory to attempt to block a hostile takeover. *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 594 (W.D. Pa. 1975).

requests to reconsider the corporate distinction under many other statutes as well. Congress has spoken clearly in the antitrust area, and any request for a change in that policy must properly be addressed to Congress.

II. The Exclusion of a Competitor Thereby Eliminating Price Competition and Reducing Product Supply Constitutes an Unreasonable Restraint of Trade.

The second question presented by the Petition involves neither a purported conflict among the circuits nor any alleged inconsistency with a holding of this Court. Instead, Petitioners argue that the court below did not require a sufficient showing of their "market power," despite the substantial evidence of an adverse effect on competition resulting from their exclusionary activities. (Petition at 22) The evidence demonstrated not only that a competitor was excluded by Petitioners' acts, but that such exclusion resulted in a substantially diminished product supply and a preclusion of significant price competition. Such adverse competitive effects have long been held sufficient to establish an unreasonable restraint of trade under the Sherman Act. *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-96 (1978).

The jury was instructed that exclusion of Respondent from the market alone was insufficient to establish a violation of Section 1 of the Sherman Act. The jury was required to find an adverse effect on competition within the market as a whole, such

as a decrease in product supply or an effect on prevailing prices. (T. 8461-62, 8477-80)[25]

Petitioners do not contest the sufficiency of the evidence with respect to the substantially adverse impact on price and supply which resulted from their acts. Rather, they ask the Court to adopt a wholly new formulation of the rule of reason which would preclude the finding of a Sherman Act Section 1 violation where defendants fail to possess some undefined level of "market power."[26] Here, the evidence demonstrated that defendants possessed sufficient "market power" to exclude plaintiff from the market, to cause prices to remain high and to restrict supply. It is hard to conceive what greater evidence of market power should be required under Section 1 of the Sherman Act.[27]

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[25]The jury was further instructed to consider "the nature and economic conditions of the relevant market" and "facts which may be peculiar" thereto in language that tracks this Court's rule of reason formulation in *National Society of Professional Engineers, supra*, 435 U.S. at 682. (T. 8478) Thus, the jury was not precluded from considering evidence of market structure or market shares. Moreover, Petitioners failed to tender any proposed instruction concerning market power, and, as the Seventh Circuit pointed out, the trial court's remarks "did not forbid closing argument and instructions on market share." 691 F.2d at 322 n. 20; App. A-21. In fact, Petitioners' trial counsel declared in the jury instruction conference that effect on price was the *only* way to show adverse effect on competition. (T. 7292)

[26]If Petitioners intend to use the term "market power" to mean "monopoly power" as defined under Section 2 of the Sherman Act, then their position amounts to nothing less than a request that this Court repeal Section 1 of the Sherman Act.

[27]Petitioners presented the startling argument in the Court of Appeals that a firm precluded from market entry could not establish an antitrust violation unless it could show that defendants increased their market shares by preventing such new entry. (Appellants' Court of Appeals Brief, pp. 47-49) Petitioners now castigate the Seventh Circuit as "particularly in error" in rejecting this argument as making "no sense in a foreclosure case." (Petition at 23)

Petitioners are unable to support their novel market power approach with any authority under the Sherman Act and therefore turn to cases under Section 7 of the Clayton Act, 15 U.S.C. §18. It is clearly inappropriate to import principles derived under that entirely different statutory standard, but even those principles provide no support for Petitioners' position.[23]

As suggested in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974), the potential competition doctrine under the Clayton Act is designed to ascertain whether removal of a potential entrant has competitive significance by determining whether participants in the market "fashion their behavior to take into account the presence of a potential entrant." (Petition at 24) In the present case, it is clear that Regal feared Independence would be a "price cutter" and did so "fashion" its behavior when it began to moderate its prices over six months before Independence entered, so as not to "make it easy for Independence Tube to enter the market." (PX 43; T. 1308) The evidence also established that Regal operated in a market with "few competing companies" which were "similar to Regal in size" and which tended toward stable pricing and high profit margins. (PX 34; T. 2479-84) Independence thereby exerted a pro-competitive effect on competition in a concentrated market even before its entry, and when it did enter, it further heightened price competition and expanded supply.

Thus, even if Clayton Act principles were applied in this Sherman Act case, Petitioners' activities would be held unlawful. Petitioners present neither a rational basis for creation of a new rule of reason formulation nor any other basis for further review.

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[23] In the Clayton Act context, courts generally must attempt to predict future effects of a merger, and "market power" is a tool to assist in that prediction. Under Section 1 of the Sherman Act, the appropriate inquiry is whether injury to competition has in fact occurred. Here the evidence demonstrated such actual effects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

VICTOR E. GRIMM
(Counsel of Record)
JOHN R. MYERS
SCOTT M. MENDEL
ANDREW I. GAVIL
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Chicago, Illinois 60602
(312) 372-1121
Attorneys for Respondent

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